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6-4.010 The Federal Tax Enforcement Program

The Federal Tax Enforcement Program is designed to protect the public interest in preserving the integrity of this nation's self-assessment tax system through vigorous, uniform enforcement of the internal revenue laws. The government's primary objective in criminal tax prosecutions is to get the maximum deterrent value from the cases prosecuted. To achieve this objective, the government's tax enforcement activities must reflect uniform enforcement of the tax laws. Uniformity is particularly necessary because prosecution standards in the tax area potentially affect more individuals than in any other area of the law. Accordingly, the Federal Tax Enforcement Program is designed to have the broadest possible impact on compliance attitudes by emphasizing balanced enforcement, with respect to not only the types of violations prosecuted but also the geographic location and economic and vocational status of the violators. In view of the importance of the uniform prosecution program, the Tax Division has been delegated the responsibility of authorizing or declining investigation and prosecution in criminal tax matters. *See* 28 C.F.R. 0.70; USAM 6-4.200. *See also* the Criminal Enforcement Section's Organizational Chart, Tax Resource Manual at 9.

6-4.011 Criminal Tax Manual and Other Tax Division Publications

The Tax Division's *Criminal Tax Manual* (1994 ed.) contains comprehensive treatments of statutes, methods of proof, various specialized areas and policies and procedures involved in criminal tax prosecutions; as well as indictment/information forms; and jury instructions. All prosecutors involved in federal criminal tax cases should cross-reference this work during their handling of criminal tax cases. The Tax Division compiles other resources useful in criminal tax prosecutions, such as the Tax Division's "Criminal Tax Protest Case Issue List," a circuit-by-circuit breakdown of recurring issues in tax protester cases. Both the *Criminal Tax Manual* and the "Criminal Tax Protest Case Issue List" are available through USANet. The *Criminal Tax Manual* is also published as part of the USABook library.

6-4.110 IRS Administrative Investigations

The IRS' Criminal Investigation Division (CID) is responsible for investigating violations of the criminal provisions of the internal revenue laws, including cases falling within the General Enforcement Plea Program (*see* the Tax Resource Manual at 7) and related violations of the criminal provisions of 18 U.S.C. CID special agents are responsible for conducting administrative investigations (*see* the Tax Resource Manual at 1 and 2) of alleged criminal violations arising under the internal revenue laws.

Upon concluding an administrative investigation, a special agent recommending prosecution must prepare a special agent's report (SAR) that details the investigation and the agent's recommendations. After review within CID, the SAR, together with the exhibits, is reviewed by District Counsel. *See* the Tax Resource Manual at 3. When prosecution is deemed warranted, District Counsel prepares a criminal reference letter (CRL) and refers the matter (*see* the Tax Resource Manual at 4) either to the Tax Division or, in those circumstances when direct referral of certain classes of cases is authorized, to the United States Attorney. *See* USAM 6-4.243. The CRL

discusses the nature of the crime(s) for which prosecution is recommended, the evidence relied upon to prove it, technical aspects and anticipated difficulties of prosecution, and the prosecution recommendations themselves. *See* 26 U.S.C. Sec. 6103(h). A referral of the matter to the Department of Justice allows the Internal Revenue Service to share a return or return information with the Department of Justice (*see* 26 U.S.C. Sec. 6103(h)), but places some limits on further IRS activity while the referral remains in effect. *See* Tax Resource Manual at 5 and 6. Where matters are referred to the Tax Division, a copy of the CRL will be forwarded simultaneously to the appropriate United States Attorney. Likewise, where matters are directly referred to the United States Attorney, a copy of the CRL will be forwarded simultaneously to the Tax Division.

6-4.120 Grand Jury Investigations -- Generally

Although a federal grand jury is empowered to investigate both tax and nontax violations of federal criminal laws, use of the grand jury to investigate criminal tax violations must first be approved and authorized by the Tax Division (*see* 28 C.F.R. Sec. 0.70; 26 U.S.C. Sec. 6103(h)), except for the following circumstances.

The Tax Division has delegated its authority to approve grand jury investigations of false and fictitious claims for tax refunds, in violation of 18 U.S.C. Sec. 286 and 18 U.S.C. Sec. 287 (other than violations committed by a professional tax return preparer) to all United States Attorneys. *See* Tax Division Directive No. 96 (December 31, 1991) and an explanatory memorandum in the Tax Resource Manual at 17 et seq. This general delegation is subject to certain limitations and reporting requirements that are set forth in Directive No. 96. This delegation is intended to bring the authorization of grand jury investigations of cases under 18 U.S.C. Sec. 286 and 18 U.S.C. Sec. 287 in line with the United States Attorneys' ability to authorize prosecution in such cases. *See* USAM 6-4.243.

6-4.121 IRS Requests to Initiate Grand Jury Investigations

In addition to using administrative process to secure evidence in an investigation, CID also may request a grand jury investigation where it is unable to complete its investigation or otherwise determines that use of administrative process is not feasible. The request for a grand jury investigation is a referral of the matter to the Department of Justice, and, while such referral is in effect, CID may not use administrative process. *See* 26 U.S.C. Sec. 7602(c).

6-4.122 United States Attorney Initiated Grand Jury Investigations

A. IRS Direct Referrals. The United States Attorney is authorized to conduct a grand jury investigation for matters arising under the internal revenue laws in direct referral matters. Nevertheless, the instances where such referrals require grand jury investigation will be rare. *See* USAM 6-4.243.

B. Tax Division Referrals for Prosecution. The United States Attorney is authorized to conduct a grand jury investigation into matters arising under the internal revenue laws referred for prosecution by the Tax Division to the extent necessary to perfect the tax charges authorized for prosecution.

C. Tax Division Referrals for Grand Jury Investigation. The United States Attorney is authorized to conduct a grand jury investigation into matters arising under the internal revenue laws referred for that purpose by the Tax Division, to the extent necessary to either perfect the tax charges authorized for investigation or determine that prosecution is inappropriate. *See* USAM 6-4.242.

D. Expansion of Nontax Grand Jury Investigations in a Single Judicial District to Include Inquiry Into Possible Federal Criminal Tax Violations. Pursuant to a limited delegation of authority from the Assistant Attorney General (Tax Division), a United States Attorney may approve expansion of nontax grand jury investigations to include inquiry into possible federal criminal tax violations in a proceeding which is being

conducted within the sole jurisdiction of the approving United States attorney. The authority delegated is limited to matters which seek either to expand nontax grand jury proceedings to include inquiry into possible federal criminal tax violations, designate the targets (subjects) and the scope of such inquiry, and terminate such proceedings. The delegation of authority does not include the authority to file an information or return an indictment on matters arising under the internal revenue laws, without obtaining specific prior authorization from the Tax Division. *See* Tax Division Directive No. 86-59.

6-4.123 Joint United States Attorney-IRS Request to Expand Tax Grand Jury Investigations

The United States Attorney must secure Tax Division approval before expanding a grand jury investigation into matters arising under the internal revenue laws to include targets not authorized by the Tax Division. A written request for expanded authorization must be submitted prior to initiating that phase of the grand jury investigation. The request must establish the basis for the Tax Division's authorization to expand the investigation. *See* USAM 6-4.211(B).

6-4.124 Grand Jury -- Drug Task Force (OCDETF) Requests

A request of an Organized Crime Drug Enforcement Task Force (OCDETF) for a joint tax-nontax grand jury investigation with IRS participation needs to be approved by the IRS District Director, rather than Internal Revenue Service Regional Counsel (Criminal Tax). The District Director then makes a referral. Similarly, a recommendation for or against prosecution arising out of an OCDETF investigation is submitted directly to the Tax Division by the District Director. *See* USAM 6-4.125. In all other respects, tax matters within the jurisdiction of an OCDETF are procedurally indistinguishable from other tax matters.

6-4.125 IRS Transmittal of Reports and Exhibits from Grand Jury Investigations

Recommendations for prosecution of violations arising under the internal revenue laws resulting from grand jury investigations must be submitted to the Tax Division for authorization. *See* USAM 6-4.200. When an investigation has produced sufficient evidence to merit indictment, the United States Attorney should have the special agent assigned to the matter prepare an SAR. Except in Drug Task Force matters, the United States Attorney and special agent should then forward to the Tax Division and Regional Counsel (Criminal Tax), respectively, separate copies of the SAR, with copies of the relevant exhibits attached to each copy of the report, for review and the ultimate determination by the Tax Division whether to authorize prosecution. The United States Attorney's views also should be forwarded to the Tax Division. Normally, review of the prosecution recommendation will be completed within sixty (60) days of receipt of the SAR by the Tax Division. *See* USAM 6-4.242.

The IRS must also transmit recommendations against prosecution (or matters without IRS recommendation) resulting from such grand jury investigations to the Tax Division for evaluation. *See* IRM 9267. *See also* USAM 6-4.242.

See USAM 6-4.124 for OCDETF procedures.

6-4.126 Effect of DOJ Termination of Grand Jury Investigation and IRS Access to Grand Jury Material

IRS access to grand jury material is controlled by Rule 6(e), Fed. R. Crim. P., and may be accomplished for use in an administrative investigation only in accordance with Rule 6(e)(3)(C)(i), Fed. R. Crim. P. (*United States v. Baggot*, 463 U.S. 476 (1983)). See also the Tax Resource Manual at 8.

6-4.130 Search Warrants

The authority of the Assistant Attorney General, Tax Division, to approve search warrants in matters arising under the internal revenue laws was delegated to United States Attorneys and other specified supervisory officials in United States Attorneys' offices where such warrant is directed at offices, structures, premises, etc., of targets or subjects of the investigation. See Tax Division Directive No. 52 (Jan. 2, 1986) and related documents in the Tax Resource Manual at 10 et seq. The authority to seek and execute search warrants is otherwise retained by the Assistant Attorney General, Tax Division, and is specifically retained where the target or subject is:

- A. An accountant;
- B. A lawyer;
- C. A physician;
- D. A public official/political candidate;
- E. A member of the clergy;
- F. A news media representative;
- G. A labor union official; or
- H. An official of a tax exempt organization under 26 U.S.C. Sec. 501(c)(3).

Where Tax Division authority is not delegated regarding search warrants, specific prior written approval of the Tax Division must be obtained.

6-4.200 Tax Division Jurisdiction and Procedures

The Assistant Attorney General, Tax Division, has responsibility for all criminal proceedings arising under the internal revenue laws except the following: proceedings pertaining to misconduct of IRS personnel; taxes on liquor, narcotics, firearms, coin-operated gambling and amusement machines, and wagering; forcible rescue of seized property (26 U.S.C. Sec. 7212(b)); corrupt or forcible interference with an officer or employee acting under the internal revenue laws (26 U.S.C. Sec. 7212(a), but not the "omnibus clause," thereof); unauthorized disclosure of information (26 U.S.C. Sec. 7213); and counterfeiting, mutilation, removal or reuse of stamps (26 U.S.C. Sec. 7208). See 28 C.F.R. Sec. 0.70.

6-4.210 Filing False Tax Returns -- Mail Fraud Charges or Mail Fraud Predicates for RICO

The authorization of the Tax Division is required before charging mail fraud counts either independently or as predicate acts to a RICO charge: (1) when the only mailing charged is a tax return or other internal revenue form or document; or (2) when the mailing charged is a mailing used to promote or facilitate a scheme which is essentially only a tax fraud scheme (e.g., a tax shelter). Such authorization will be granted only in exceptional circumstances. See Tax Division Directive No. 99 (March 30, 1993).

The filing of a false tax return, which almost invariably involves a mailing, is a tax crime chargeable under 26 U.S.C. 7206(1) (if the violator is the taxpayer) or 26 U.S.C. 7206(2) (if the violator is, for example, a tax return preparer or tax shelter promoter). It is the position of the Tax Division that Congress intended that tax crimes be charged as tax crimes and that the specific criminal law provisions of the Internal Revenue Code should

form the focus of prosecutions when essentially tax law violation motives are involved, even though other crimes may technically have been committed. See *United States v. Henderson*, 386 F.Supp. 1048, 1052-53 (S.D.N.Y.1971).

Under certain narrowly defined circumstances, however, a mail fraud prosecution predicated on a mailing of an internal revenue form or document, or where the scheme involved is essentially a tax fraud scheme, might be appropriate in addition to, but never in lieu of, applicable substantive tax charges. Such a situation could arise in a tax shelter or other tax fraud case, when individuals, through no deliberate fault of their own, were demonstrably victimized as a result of a defendant's fraudulent scheme and use of a mail fraud charge is necessary to achieve some legitimate, practical purpose like securing restitution for the individual victims. The fact that a defendant committed conduct which independently victimized individuals is to be reflected in the mail fraud allegations in the indictment. Mail fraud charges could also be used in a tax fraud case when the government was also victimized in a non-revenue collecting capacity. See, e.g., *United States v. Busher*, 817 F.2d 1409, 1412 (9th Cir.1987) (case involving primarily false contract claims). Nevertheless, to the extent victimization of third parties constitutes an exception to the general rule, the evidence must demonstrate direct, substantial victimization as opposed to a general or theoretical harm to a general class of victims.

A similar policy will be followed with respect to the filing of RICO charges predicated on mail fraud charges which in turn involve essentially only a tax fraud scheme. Tax offenses are not predicates for RICO offenses-a deliberate Congressional decision-and charging a tax offense as a mail fraud charge could be viewed as circumventing Congressional intent unless unique circumstances are present justifying the use of a mail fraud charge.

However, once a decision has been made by the Tax Division to authorize mail fraud charges, the decision whether to authorize a RICO charge in turn based on these mail fraud charges is one for the Criminal Division to make.

For a determination as to whether a mail fraud charge predicated on the mailing of internal revenue forms or documents is appropriate, the Tax Division should be consulted early in the investigation rather than waiting until a last minute decision is needed.

6-4.211 Standards of Review

A. Prosecution. The standards underlying review of criminal tax matters for authorization of prosecution are set forth in the *Principles of Federal Prosecution* and require evidence supporting a prima facie case and a reasonable probability of conviction. See USAM 9-27.220. Other considerations influencing authorization for prosecution are in accord with the dictates of the Federal Tax Enforcement Program. See generally USAM 6-4.010.

B. Grand Jury Investigation. The standards underlying review of criminal tax matters for authorizing grand jury investigations require articulable facts supporting a reasonable belief that a tax crime is being or has been committed. See USAM 9-27.210.

6-4.212 Categories of Matters Reviewed

A. IRS Referrals. The Tax Division utilizes a complex/noncomplex case designation procedure to expedite the review of administrative criminal tax matters referred from IRS while maintaining uniformity of prosecution standards.

1. Complex Matters. Complex matters generally are those referrals which utilize an indirect method of proof, are factually or legally complex, contain technical and/or sensitive tax issues, or involve a policy issue. Complex matters are reviewed by docket attorneys from the three regional Criminal Enforcement

Sections. Docket attorneys prepare prosecution memoranda analyzing the evidence, highlighting procedural and/or substantive problems and discussing recommendations for further action. The matters are further reviewed by one or more senior Criminal Enforcement Section attorneys whereupon a final decision to prosecute or decline prosecution is made.

2. Noncomplex Matters. Noncomplex matters are screened by senior Criminal Enforcement Section attorneys to ensure that no issues requiring in-depth review are present. Noncomplex matters are transmitted within two weeks to the appropriate United States Attorney for consideration within 90 days. *See* USAM 6-4.244.

B. United States Attorney Requests for Grand Jury Authorization. *See* USAM 6-4.122 and 6-4.123. Where Tax Division authorization is required, requests for grand jury authorizations for matters arising under the internal revenue laws are approved or denied by Criminal Enforcement Section personnel.

6-4.213 Review of Direct Referrals

To ensure national uniformity of prosecution standards, the Tax Division monitors all matters directly referred to United States Attorneys. *See* USAM 6-4.243. Should such review reveal that a matter was improperly referred, the Tax Division will so notify the United States Attorney and the matter shall be forwarded to the Tax Division for review.

6-4.214 Conferences

Conferences with the Tax Division during its review of the referred case are not a matter of right but, if requested, are generally granted. A conference is designed to provide the proposed defendant an opportunity to present any explanations or evidence which he/she desires the Tax Division to consider in reaching a decision regarding prosecution. However, a conference is not an opportunity to explore the government's evidence. The Division's practice regarding "discovery" is to advise conferees of the proposed charges, method of proof, and income and tax figures recommended by IRS. The proposed defendant is also advised that the charges, method of proof, and computations are subject to change. Statements made by a proposed defendant will be used not only to evaluate the matter but also in any court proceeding, criminal or civil. Rule 801(d)(2), Fed. R. Evid. However, statements made by attorneys for taxpayers (i.e., vicarious admissions) at conferences will not be utilized in general in court proceedings. Investigative leads provided at the conference may, however, be developed. In administratively investigated cases, plea negotiations are permitted consistent with the Tax Division's major count policy and appropriate United States Attorney's Office policy. *See* DOJ Tax Division Directive No. 86-58 (May 14, 1986).

If time and circumstances permit, a conference in Washington, D.C., generally is granted upon a written request to the Tax Division from the taxpayer or the taxpayer's authorized representative. If the matter has been forwarded to the United States Attorney before the request is received, the request will be denied with the suggestion that the taxpayer seek a conference with the United States Attorney. Such conference is granted at the discretion of the United States Attorney. In unusual circumstances, the Tax Division may request that a conference be held and that the United States Attorney submit a report regarding any recommended changes in the authorization.

6-4.215 Expedited Review

An expedited review is one in which the Tax Division will render a final decision regarding prosecution within 30 days of receipt from IRS of the CRL, SAR, and relevant exhibits. In exceptional circumstances when the United States Attorney believes that a given matter must be processed more quickly than the Division's stated

timeframe, the United States Attorney personally must submit a written request to the Chief of the appropriate Criminal Enforcement Section, requesting an expedited review. The request must outline whatever difficulties exist requiring such expedited review. An expedited review will be granted whenever resources permit.

6-4.216 Priority Review

A priority review is one wherein the Tax Division will render a final decision regarding prosecution within 60 days of receipt from IRS of the CRL, SAR, and relevant exhibits. A request for a priority review must be made in writing by an Assistant United States Attorney to the Chief of the appropriate Criminal Enforcement Section and will be granted whenever resources permit.

6-4.217 On-Site Review

Criminal Enforcement Section personnel will perform on-site reviews of OCDETF and other matters in appropriate circumstances. On-site reviews, either of grand jury investigations or prosecution recommendations, are only granted in exceptional circumstances and through the written request procedure outlined in the above-section on expedited reviews. *See* USAM 6-4.215.

6-4.218 Authorizations and Declinations

The final authority for the prosecution of all criminal matters arising under the internal revenue laws rests with the Assistant Attorney General, Tax Division. 28 C.F.R. Sec. 0.70.

6-4.219 Assistance of Criminal Enforcement Section Personnel

The Tax Division will consider requests by the United States Attorney for litigation assistance. Reasons for requests for trial assistance include those instances when the United States Attorney:

- A. Recuses himself/herself and his/her office;
- B. Lacks sufficient resources, personnel or expertise; or
- C. Declines to prosecute a matter. *See* USAM 6-4.245.

The United States Attorney is generally expected to handle those matters accepted for prosecution under the non-complex procedures. *See* USAM 6-4.244.

6-4.240 United States Attorney's Responsibilities

The United States Attorney is normally responsible for investigation and prosecution of criminal tax matters after authorization by the Tax Division.

6-4.241 Review of CRLs

The United States Attorney will receive a copy of the CRL in any matter under the investigative jurisdiction of CID and referred to the Tax Division for prosecution or prosecution-related action when venue for charges recommended in the referral falls within the United States Attorney's district. The United States Attorney may desire to review the matter. Views of the United States Attorney must be communicated to the Tax Division within 21 days of receipt of the CRL, or within such shorter period as may be necessitated by exigent

circumstances, such as the impending expiration of the statute of limitations. When no comments are received within 21 days, the Tax Division will assume that the United States Attorney did not wish to express his/her views regarding the prosecution potential of the matter. The Tax Division will exercise its best efforts, within the time constraints imposed by the timing of the referral to it by the IRS, to refer the case to the United States Attorney at least 60 days prior to the expiration of any statute of limitations.

6-4.242 Recommendation Following a Grand Jury Investigation

At the conclusion of a grand jury investigation authorized by or on behalf of the Tax Division, the United States Attorney conducting the investigation should submit an analysis of the investigation to the Tax Division and recommend either that charges be brought or prosecution be declined. If nontax charges are recommended, the analysis must explain how these nontax charges relate to the tax charges. A copy of the proposed indictment or information should accompany the analysis. In addition to the United States Attorney's analysis, all relevant exhibits generated during the course of the grand jury investigation, the transcript of the proceedings, and the SAR must be submitted. *See* USAM 6-4.125.

The Tax Division must receive this material at least 60 days prior to the expiration of the statute of limitations unless the Tax Division already has agreed to handle the matter on an expedited basis in accordance with USAM 6-4.215.

6-4.243 Review of Direct Referral Matters

The direct referral program is designed to promote the rapid prosecution of matters that constitute an imminent drain on the U.S. Treasury. Because immediate action is often required, IRS is authorized to refer the following categories of matters directly to the United States Attorney for prosecution:

- A. Excise taxes -- all 26 U.S.C. and 18 U.S.C. offenses involving taxes imposed by Subtitles C, D and E, except Chapter 24;
- B. Multiple filings of false and fictitious returns claiming refunds (18 U.S.C. Secs. 286 and 287) -- all offenses wherein taxpayer files two or more returns for a single tax year claiming false refunds, excluding return preparers who falsify returns to claim refunds and cases involving false or fictitious claims for refund which are submitted to the Internal Revenue Service through the Electronic Filing (ELF) program.
- C. Trust fund matters (26 U.S.C. Secs. 7215 and 7512) -- offenses involving alleged violations of the trust fund laws;
- D. "Ten percenter" matters (26 U.S.C. Sec. 7206(2)) -- when arrest occurs contemporaneously with the offense;
- E. Returns (IRS Form 8300) relating to cash received in a trade or business pursuant to 26 U.S.C. Sec. 6050I (26 U.S.C. Secs. 7203 and 7206 only). *See* DOJ Tax Division Directive No. 87-61 (Feb. 27, 1987).

The United States Attorney may initiate or decline prosecution of direct referrals without prior approval from the Tax Division (whereas in all other instances the United States Attorney can initiate proceedings only with specific Tax Division authorization). Nevertheless, once prosecution has been initiated, the indictment, information, or complaint may not be dismissed without the prior approval of the Tax Division. *See* USAM 6-4.246.

6-4.244 Review of Noncomplex Matters

Within three months of receipt of a designated non-complex matter, the United States Attorney is to review the matter and initiate proceedings, request that the matter be declined, *see* USAM 6-4.245, or request that the Tax Division handle the matter. *See* USAM 6-4.219.

6-4.245 Request to Decline Prosecution

A. Request by United States Attorney. Whenever the United States Attorney feels that a particular tax matter should not be prosecuted, those views are to be forwarded to the Tax Division. The Assistant Attorney General will then consider the matter and determine whether the matter should be prosecuted or declined. If it is determined that the matter should be prosecuted, the United States Attorney will be requested to proceed. If the United States Attorney declines to proceed, the matter will be handled by Criminal Enforcement Section personnel from the Tax Division. Notice that the United States Attorney's desires not to proceed must be received sufficiently in advance of the expiration of the statute of limitations or any other deadlines to allow adequate consideration by the Tax Division and adequate time for preparation by Division personnel.

B. Grand Jury No Bill. Once a grand jury returns a no bill or otherwise acts on the merits in declining to return an indictment, the same matter (i.e., same transaction or event and the same putative defendant) must not be presented to another grand jury or represented to the same grand jury without first securing the approval of the Assistant Attorney General, Tax Division. Ordinarily such approval will not be given in the absence of additional or newly discovered evidence or a clear circumstance of a miscarriage of justice.

6-4.246 Request to Dismiss Prosecution

Indictments, informations, and complaints may not be dismissed without prior approval of the Tax Division except when a superseding indictment has been returned or the defendant has died. Any request to dismiss a prosecution should indicate that the United States Attorney concurs with the request.

6-4.247 United States Attorney Protest of Declination

If a United States Attorney disagrees with the Tax Division's decision to decline prosecution of a matter arising out of a grand jury investigation, that official may request that the Tax Division reconsider its determination. The United States Attorney's request must be in writing to the Assistant Attorney General of the Tax Division and set forth the United States Attorney's reasons for desiring to proceed with prosecution.

6-4.248 Status Reports

After criminal tax cases have been referred to a United States Attorney, it is essential that the Tax Division be kept advised of all developments through periodic case status reports. As the case progresses, the minimum information required for the records of the Tax Division is as follows:

- A. A copy of the indictment returned (or no billed), or the information filed, which reflects the date of the return (or no bill) or filing;
- B. Date of arraignment and kind of plea;
- C. Date of trial;
- D. Verdict and date verdict returned;
- E. Date and terms of sentence; and
- F. Date of appeal and appellate decision.

It is important that information regarding developments in pending cases be provided to the Tax Division in a timely manner in order that the Department's files reflect the true case status and so that, upon completion of the criminal case, the case can be timely closed and returned to the IRS for the collection of any revenue due through civil disposition.

6-4.249 Return of Reports and Exhibits

Upon completion of a criminal tax prosecution by a final judgment and the conclusion of appellate procedures, the United States Attorney should return to witnesses their exhibits. Grand jury materials should be retained by the United States Attorney under secure conditions, in accordance with the requirements of maintaining the secrecy of grand jury material. *See* Rule 6(e), Fed. R. Crim. P. All non-grand jury reports, exhibits, and other materials furnished by the IRS for use in the investigation or trial should be returned by certified mail, return receipt requested, to the appropriate District Director, IRS, Attention: Chief, CID, as directed in the Tax Division's letter authorizing prosecution or as directed by Regional Counsel in cases directly referred to the United States Attorney.

6-4.270 Criminal Division Responsibility

The Criminal Division has limited responsibility for the prosecution of offenses investigated by the IRS. Those offenses are: excise violations involving liquor tax, narcotics, stamp tax, firearms, wagering, and coin-operated gambling and amusement machines; malfeasance offenses committed by IRS personnel; forcible rescue of seized property; corrupt or forcible interference with an officer or employee acting under the internal revenue laws (but not omnibus clause); and unauthorized mutilation, removal or misuse of stamps. *See* 28 C.F.R. Sec. 0.70.

6-4.310 Major Count Policy/Plea Agreements

The overwhelming percentage of all criminal tax cases are disposed of by entry of a plea of guilty. In most cases, the transmittal letter forwarding the case from the Tax Division to the United States Attorney will identify the major count(s) that have been authorized for prosecution. The United States Attorney's Office, without prior approval of the Tax Division, is authorized to accept a plea of guilty to the major count(s) of the indictment or information. The United States Attorney also is authorized to seek a plea to more than the major count(s) if it is considered warranted.

The designation of the major count is generally premised on the following considerations:

- A. Felony counts take priority over misdemeanor counts.
- B. Tax evasion counts (26 U.S.C. Sec. 7201) take priority over all other substantive tax counts.
- C. The count charged in the indictment or information which carries the longest prison sentence will be considered a major count.
- D. As between counts under the same statute, the count involving the greatest financial detriment to the United States (i.e., the greatest additional tax due and owing) will be considered the major count.
- E. Where there is little difference in financial detriment between counts, the determining factor will be the relevant flagrancy of the offense.
- F. Where the determination of the major count(s) is complicated by considerations not covered by the above rule, the United States Attorney is encouraged to consult the Tax Division.

When the major count of a tax indictment charges a felony offense, United States Attorneys will not accept a plea to a lesser-included offense nor substitute misdemeanor offenses for the felony offense charged. The Tax Division will not, absent unusual circumstances, consent to reduce a charge from a felony to a misdemeanor merely to secure a plea.

After a defendant's guilty plea to one or more major counts has been accepted by the court and the sentence has been imposed, the remaining counts of the indictment or information may be dismissed.

A defendant sometimes indicates in advance of the indictment or information that he intends to enter a guilty plea to the major count(s). If this occurs, the full extent of the defendant's tax offenses must be included in the court records by charging the defendant with all of the authorized offenses even though, after plea and sentence, the residual counts may be dismissed. In presenting the factual basis for the prosecution in compliance with Rule 11, Fed. R. Crim. P., the prosecutor should include the full extent of the violations on residual counts in order to demonstrate the actual criminal intent on the part of the defendant in accordance with the Sentencing Guidelines. A plea of guilty by a corporation will not result in the dismissal of charges against an individual unless special circumstances exist for justifying such dismissal. *See* USAM 9-2.146.

6-4.311 Application of Major Count Policy in Sentencing Guideline Cases

The advent of the Sentencing Guidelines in 1987 and the Department's adoption of policies pursuant thereto necessitated certain minor conforming changes to the Tax Division's Major Count Policy (USAM 6-4.310).

A. Tax Offenses Which Are All Part of the Same Course of Conduct or Common Scheme or Plan. Normally, no change in the application of the Major Count Policy will be required by virtue of the Guidelines and the Department's plea policy for Guideline cases. In most cases, all of the tax charges in an indictment are related. Consequently, even if the defendant pleads to a single count and the remaining counts are dismissed, the tax loss from all of the years should be taken into account in determining the tax loss for the offense to which a defendant pleads. Thus, in the usual case, the Tax Division will continue to designate a single count as the major count according to the principles previously utilized in designating the major count. *See* USAM 6-4.310.

B. Tax Offenses Which Are Not All Part of the Same Course of Conduct or Common Scheme or Plan. Where all of the tax charges are not part of the same course of conduct or common scheme or plan, however, the Department's plea policy for Guideline cases may require the Tax Division either to designate as major counts one count from each group of unrelated counts or to designate one count from one of the groups of unrelated counts as the major count and have the prosecutor obtain a stipulation from the defendant establishing the commission of the offenses in the other group (*See* U.S.S.G. Sec. 1B1.2(c)). This will be the case where the offense level of the group with the highest offense level must be increased under U.S.S.G. Sec. 3D1.4.

C. Designating More Than One Count as a Major Count. Designating more than a single year as a major count may also be required where the computed guideline sentencing range exceeds the maximum sentence which can be imposed under a single count.

D. Tax Charges and Non-Tax Charges. In cases in which there are both tax counts and non-tax charges, the selection of which tax count to designate as the major count may not have any effect on the applicable guideline range because the offense level of the group or groups of non-tax offenses is 9 or more levels higher than the offense level of the group containing the tax charges (*See* U.S.S.G. Secs. 3D1.2, 3D1.4). In such cases, the Tax Division will normally continue to designate the major count by application of the usual rules for selecting the major count. However, the Tax Division may designate a less serious tax offense in the group as the major count if it is supplied with sufficient information establishing that such a selection will not affect the applicable guideline range and with adequate justification for a deviation from the Major Count Policy.

6-4.320 Nolo Contendere Pleas

Department of Justice policy requires all government attorneys to oppose the acceptance of *nolo contendere* pleas. When pleading "*nolo*" the defendant may create the impression that the government has only a technically adequate case which the defendant elects not to contest. A guilty plea is preferred because it strengthens the government position when the defendant contests a civil fraud penalty in an ancillary proceeding, as a *nolo* plea does not entitle the government to use the doctrine of collateral estoppel. Federal prosecutors may not consent to a plea of *nolo contendere* except in the most unusual circumstances and only after a recommendation for doing

so has been approved by the Assistant Attorney General, Tax Division. *See* USAM 9-16.010 and 9-27.500. The government attorney also will oppose dismissal of any charges to which the defendant does not plead nolo contendere. *See* USAM 9-27.530.

6-4.330 Alford Pleas

In *North Carolina v. Alford*, 400 U.S. 25 (1970), the Supreme Court upheld the validity of accepting a plea of guilty over the defendant's claims of innocence. United States Attorneys are instructed not to consent to a so-called "Alford plea" except in the most unusual circumstances and then only after a recommendation for so doing has been approved by the Assistant Attorney General, Tax Division, or a higher departmental official. *See* USAM 9-16.015 and 9-27.440. Apart from refusing to enter into *Alford* plea agreements, however, the degree to which government attorneys can express their opposition to such pleas is limited. Prosecutors should discourage *Alford* pleas by refusing to agree to terminate prosecutions where such a plea is proffered to fewer than all of the charges pending. If an *Alford* plea to fewer than all charges is tendered and accepted over the government's objection, the government attorney will proceed to trial on all of the remaining counts not barred on double jeopardy grounds unless the Assistant Attorney General, Tax Division, approves dismissal of the charges.

6-4.340 Sentencing

A. Rule 32(a), Federal Rules of Criminal Procedure, permits government counsel to make a statement to the court at the time of sentencing. Counsel for the government should make a full statement of facts, including if applicable, the amount of tax evaded in all of the years for which a defendant was indicted; the means utilized to perpetrate and conceal any fraud; the past criminal record of the taxpayer; and all other information that the court may consider important in imposing an appropriate sentence.

B. When recommendations are made to the court on sentencing, the Tax Division prefers that government counsel request the imposition of a jail sentence in addition to the fine, together with costs of prosecution. In the usual situation, the payment of the civil tax liability, plus a fine, costs, and probation, does not constitute a satisfactory disposition of a criminal tax case.

C. Notwithstanding the foregoing, government counsel may agree to a sentence of probation (preferably with alternative conditions of confinement) when (i) the defendant pleads guilty, (ii) the sentencing guidelines range is 0-6 months (and within Criminal History Category I), and (iii) the United States Attorney personally, by signature, must approve a written memorandum to the case file setting forth the unusual and exceptional circumstances, warranting such agreement (for example, the need to secure cooperation against a more culpable party, or serious post-indictment degradation in the evidence available for trial such as the death of a witness or the loss or suppression of evidence). A copy of the United States Attorney's written determination must be supplied to the Tax Division at the same time the United States Attorney's office is required to notify the Division that the case has been closed.

6-4.350 Costs of Prosecution

The principal substantive criminal tax offenses (i.e. , 26 U.S.C. Secs. 7201, 7203, 7206(1) and (2)), provide for the imposition of costs of prosecution upon conviction. The Tax Division strongly recommends that attorneys for the government seek costs of prosecution in criminal tax cases.

6-4.360 Compromise of Criminal Liability/Civil Settlement

While statutory authority under 26 U.S.C. Sec. 7122(a) does exist for the Attorney General, after referral of a case to the Department, to enter into agreements to compromise criminal tax cases without prosecution, as a matter of longstanding policy, such authority is very rarely exercised. If it is concluded that there is a reasonable probability of conviction and that prosecution would advance the administration of the internal revenue laws, any decision to forego prosecution on the ground that the taxpayer is willing to pay a fixed sum to the United States, would be susceptible to the attack that the taxpayer was given preferential treatment because of his ability to pay whatever amount of money the government demanded.

Consequently, proposed criminal tax cases are reviewed without any consideration being given to the matter of civil liability or the collection of taxes, penalties, and interests. In short, proposed criminal tax cases are examined with the view to determining whether a violation has occurred to the exclusion of any consideration of civil liability.

Absent extraordinary circumstances, such as permanent loss of tax revenues unless immediate protective action is taken, settlement of the civil liability is postponed until after sentence has been imposed in the criminal case, except when the court chooses to defer sentencing pending the outcome of such settlement. In this event, the IRS should be notified so that it can begin civil negotiations with the defendant.

However, the Tax Division strongly encourages, but does not require, that a plea agreement include certain civil admissions by the defendant, including: (1) admission of either receipt of enumerated amounts of unreported income or claimed enumerated amounts of illegal deductions or improper credits for years set forth in the plea agreement; (2) a stipulation that defendant is liable for the fraud penalty imposed by the Internal Revenue Code (26 U.S.C. Sec. 6663) on the understatements of liability for the years involved; and (3) an agreement by the defendant to file, prior to sentencing, complete and correct initial or amended personal returns for the years subject to the above admissions and, if requested, to provide the IRS with information regarding the years covered by the returns and to pay, at sentencing, all additional taxes, penalties and interest which are due and owing and (4) an agreement by the defendant not to file thereafter any claims for refund of taxes, penalties, or interest for amounts attributable to the returns filed incident to the plea. See Memorandum, United States Department of Justice, Tax Division, "Civil Settlements in Plea Agreement," June 3, 1993, in the Tax Resource Manual.